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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

G. F. MINGHELLA et al.,

Cross-complainants and  
Appellants.

v.

ANCHOR BAY ENTERTAINMENT,  
LLC, et al.,

Cross-defendants and  
Respondents.

B263618

(Los Angeles County  
Super. Ct. No. BC496060)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Steven J. Kleinfeld, Judge. Affirmed.

Law Office of Paul J. Katz and Paul J. Katz for Cross-complainants and Appellants.

Romero Law and Alan J. Romero, for Cross-defendants and Respondents.

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## **INTRODUCTION**

G. F. Minghella, also known as Giovanni Franco Minghella, also known as John Yuka, as trustee of the John Yuka and Giulia Family Trust, appeals from an order and judgment granting a special motion to strike his sole cause of action for abuse of process against respondents Anchor Bay Entertainment, LLC (Anchor Bay), Romero Law Group, APC and Alan J. Romero (Romero). Appellant contends respondents failed to demonstrate that his cause of action was subject to a special motion to strike under Code of Civil Procedure section 425.16.<sup>1</sup> He further contends he satisfied his burden of demonstrating that his claim had minimal merit. For the reasons set forth below, we conclude that the trial court properly granted respondents' special motion to strike. Accordingly, we affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

On November 21, 2014, appellant filed a trustee's cross-complaint for abuse of process against respondents. The cross-complaint alleged that appellant is an individual living in London, England, and trustee of the John Yuka and Giulia Family Trust. It further alleged that appellant married Lindsay Dunlap in 1995, and that before their marriage, appellant and Dunlap executed a prenuptial agreement. Although appellant and Dunlap divorced in 1997, the cross-complaint alleged that Dunlap's obligations under the prenuptial agreement continued. In 2009, allegedly as repayment for amounts due under the prenuptial agreement, Dunlap conveyed to appellant and the Trust a piece of real property located in Malibu, California. It was alleged that when Dunlap conveyed the property, its fair market value was less than \$3 million while mortgages and other valid encumbrances on the property exceeded \$5 million.

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<sup>1</sup> All further statutory citations are to the Code of Civil Procedure, unless otherwise stated.

The cross-complaint further alleged that in 2007, Anchor Bay filed a lawsuit against Dunlap. Romero represented Anchor Bay in the action. On November 8, 2010, Anchor Bay obtained a judgment against Dunlap for approximately \$2 million. On November 20, 2012, Anchor Bay filed the underlying action against Dunlap, Minghella and the Trust, alleging that Dunlap had fraudulently transferred the Malibu property to Minghella and the Trust. Romero also represented Anchor Bay in the instant action.

The cross-complaint alleged that respondents had abused the legal process by (1) pursuing claims against Minghella despite knowing the claims lacked merit, and (2) attempting to secure a judgment purporting to affect the Malibu property despite not giving Minghella proper notice and concealing from the court that Minghella had not been served and had not had default entered against him. As to the latter, the cross-complaint alleged that when respondents filed the instant action, they knew that the Malibu property was not an “asset” under the California Uniform Fraudulent Transfer Act, as it had no equity when it was conveyed in 2009.<sup>2</sup> Respondents also allegedly knew that Minghella had paid “reasonably equivalent value” for the Malibu property, as Dunlap allegedly had transferred the property as payment for existing debts under the prenuptial agreement.

As to respondents’ allegedly improper attempt to secure a judgment, the cross-complaint alleged that respondents made no effort to contact Minghella or serve him with the complaint in the underlying action. Instead, respondents claimed to have proceeded by substitute service of the Trust -- a legal

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<sup>2</sup> The California Uniform Fraudulent Transfer Act was subsequently renamed the California Uniform Voidable Transactions Act, Civil Code section 3439 et seq. (eff. January 1, 2016).

impossibility, as a Trust is not a legal entity and is incapable of suing or being sued.<sup>3</sup> The cross-complaint further alleged that respondents intentionally led the superior court to believe that Minghella had been served. They filed a case management statement representing to the court that “All parties named in the complaint have been served, have appeared, or have been dismissed.” It was further alleged that in subsequent court filings -- Anchor Bay’s opposition to Dunlap’s motion to quash and its motion for summary judgment -- respondents stated that a default had been entered against the Trust, failing to disclose that their request for default judgment against Minghella had been rejected by the court clerk for lack of service. Similarly, when the court issued a tentative decision stating that a default had been entered against Minghella, respondents failed to advise the court of its error, but modified the language in the proposed statement of decision to state that a default had been entered against the Trust.

On January 13, 2015, respondents filed a special motion to strike the cross-complaint under section 425.16. They argued that the cross-complaint fell within the purview of section 425.16, and that appellant could not demonstrate a probability of success, as respondents’ alleged misconduct was protected by the litigation privilege, Civil Code section 47. Respondents also challenged appellant’s interpretation of the court clerk’s rejection of the request for entry of default against Minghella, observing that the clerk had rejected the request on the ground, among others, that “Default [was] already entered as to John Yuka & Giulia Family Trust on 4-9-13.”

Appellant opposed the special motion to strike. He argued (1) that respondents’ alleged misconduct was an attempt to defraud the court and take trust property without due process, (2) that the “gravamen” of respondents’ alleged

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<sup>3</sup> The Trust was later dismissed as a defendant in the underlying action.

misconduct involved noncommunicative acts not protected by the litigation privilege, and (3) that to the extent respondents' conduct was communicative, it was not protected because it constituted intentional misstatements intended to deceive the court in violation of Business and Professions Code section 6128.<sup>4</sup>

On April 3, 2015, the trial court granted respondents' special motion to strike the cross-complaint. The court's 15-page order found that respondents had met their burden of demonstrating that the cross-complaint arose from their exercise of free speech or petition rights. It determined that respondents' alleged conduct -- "making no efforts to contact Minghella or serve him with [the] complaint, proceeding upon substitute service of the Trust, leading the Court to believe that Minghella had been served, misrepresenting in a Case Management Statement that all parties had been served, filing an opposition that argued that the Trust was served by substitute service, never advising the Court that request for entry of default as to Minghella had been rejected, misrepresenting in a motion for summary judgment that a default had been entered against [the] Trust, and never advising the Court that [it had] erred in stating in the Tentative Decision that Minghella had been served" -- fell under section 425.16, subdivision (b)(1) and (2), as any written or oral statement or writing made before a judicial proceeding or made in connection with an issue under consideration or review by a judicial body.

The court further determined that appellant could not demonstrate a probability of success on the merits, as respondents' conduct was protected by the litigation privilege. It ruled: "The gravamen of the action is the attempt to procure

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<sup>4</sup> Appellant also alleged that he could assert a valid tort claim against respondents for trespass, and he sought leave to file an amended cross-complaint alleging the trespass claim. The court declined to consider the proposed trespass claim, and appellant subsequently withdrew his motion for leave to file an amended complaint.

a fraudulent conveyance judgment through a misrepresentation to the Court that all necessary parties had been served, and had either appeared or defaulted. However reprehensible this conduct may be, it is communicative conduct made in a judicial proceeding by an attorney to achieve the objects of the litigation, and which has a connection to the action. . . . To the extent that other noncommunicative acts are alleged, they are necessarily related to the allegedly wrongful communicative act.” A judgment granting the special motion to strike and dismissing the cross-complaint was entered May 5, 2015.

On April 22, 2015, appellant noticed an appeal from the court’s order granting respondents’ special motion to strike the cross-complaint.

### **DISCUSSION**

“A SLAPP suit -- a strategic lawsuit against public participation -- seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted . . . section 425.16 -- known as the anti-SLAPP statute -- to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056 (*Rusheen*)). To determine whether a cause of action should be stricken under the anti-SLAPP statute, section 425.16 establishes a two-part test. Under the first part, the party bringing the motion has the initial burden of showing that the cause of action arises from an act in furtherance of the right of free speech or petition -- i.e., that it arises from a protected activity. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Once the moving party has met its burden, the burden shifts to the other party to demonstrate a probability of prevailing on the cause of action. (*Ibid.*) Only a cause of action that satisfies both parts of the anti-SLAPP statute -- i.e., that arises from protected speech or petitioning and lacks even

minimal merit -- is a SLAPP, subject to being stricken under the statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) An appellate court independently reviews the trial court's order granting a special motion to strike under section 425.16. (*Rusheen, supra*, at p. 1055.)

A. *Appellant's Cause of Action for Abuse of Process Arose from Protected Speech or Petitioning.*

Appellant asserted a claim for abuse of process against respondents. As the appellate court in *Booker v. Rountree* (2007) 155 Cal.App.4th 1366 (*Booker*) observed, "The gravamen of [an abuse of process] claim is misconduct in the underlying litigation. Indeed, that is the essence of the tort of abuse of process -- some misuse of process in a prior action -- and it is hard to imagine an abuse of process claim that would not fall under the protection of the statute." (*Id.* at p. 1370, italics omitted.) The instant claim confirms the court's observation. In his cause of action for abuse of process, appellant alleged that respondents engaged in misconduct in the underlying fraudulent conveyance action. The alleged misconduct consisted of affirmative acts of misrepresentations in court filings, and acts of omission in failing to advise the court about certain facts. Respondents' alleged acts, however, were written or oral statements made in a judicial proceeding or made in connection with an issue under consideration or review by a court. Thus, the acts qualify for protection under section 425.16, as acts "in furtherance of [a] person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" (§ 425.16, subd. (b)(1)). (See § 425.16, subd. (e) [an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or

any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . .”]; see also *Rusheen, supra*, 37 Cal.4th at p. 1056 [protected activity under section 425.16 includes “communicative conduct such as the filing, funding, and prosecution of a civil action”].) To the extent respondents’ allegedly wrongful acts are noncommunicative acts not protected under section 425.16, the abuse of process claim would still be subject to section 425.16, as the protected acts are not merely incidental to noncommunicative acts. (See *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551, quoting *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [“Where, as here, a cause of action is based on both protected activity and unprotected activity, it is subject to section 425.16 “‘unless the protected conduct is ‘merely incidental’ to the unprotected conduct.’””].) Here, respondents’ affirmative misrepresentations were directly related to their alleged failure to advise the court, as the purported failure involved correcting misunderstandings that resulted from respondents’ prior misrepresentations to the court.

Appellant’s reliance on *Jespersen v. Zubiata-Beauchamp* (2003) 114 Cal.App.4th 624 (*Jespersen*), and *Renewable Resources Coalition, Inc. v. Pebble Mines Corporation* (2013) 218 Cal.App.4th 384 (*Renewable Resources*) is misplaced. In *Jespersen*, at page 632, this court concluded that a “garden-variety attorney malpractice” claim was not subject to section 425.16, as it was not based on the attorneys’ “having filed declarations, motions, or other papers in that action, or upon [their] appearance on discovery or other motions,” but rather, on the attorneys’ failure to comply with the discovery statute and two court orders to do



so. (*Id.* at p. 630.) In contrast, here, the abuse of process claim arose from respondents' alleged misrepresentations in court filings and respondents' related misconduct in failing to correct errors and misunderstandings that resulted from those misrepresentations.

Likewise, *Renewable Resources*, *supra*, 218 Cal.App.4th at pages 396 to 397, does not assist appellant. There, the appellate court held that “to determine the applicability of the anti-SLAPP statute, we look to the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct.*” Thus, although litigation activity is protected activity, section 425.16 would not apply where a complaint merely alleges that the plaintiff was forced to incur litigation costs in response to a defendant's nonprotected activity. (*Id.* at p. 397.) In contrast, the instant cross-complaint alleged that respondents engaged in activity protected under section 425.16: it alleged that respondents made written or oral statements to the court or made written or oral statements in connection with a matter (the fraudulent conveyance action) pending before the court. In short, the cause of action for abuse of process is subject to section 425.16.

B. *Appellant has not Shown a Probability of Success on the Merits of His Abuse of Process Claim.*

As respondents have met their burden of demonstrating that the abuse of process claim arose from protected activity, the burden shifts to appellant to show that the claim has minimal merit. Appellant cannot do so, as respondents' acts are absolutely privileged under the litigation privilege, Civil Code section 47.

The litigation privilege applies to “any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]” (*Silberg v. Anderson* (1990))

50 Cal.3d 205, 212.) Our Supreme Court has noted that “[t]he ‘[p]leadings and process in a case are generally viewed as privileged communications.’ [Citation.]” (*Rusheen, supra*, 37 Cal.4th at p. 1058.) Indeed, the litigation privilege “has been applied specifically in the context of abuse of process claims alleging the filing of false or perjurious testimony or declarations. [Citations.]” (*Ibid.*) Thus, in *Rusheen*, the court concluded that “the communicative act of filing an allegedly false declaration of service of process fell within the litigation privilege.” (*Ibid.*; see also *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1430 [litigation privilege applied to bar claim for abuse of process for the filing of allegedly false declaration].) Moreover, “where the gravamen of the complaint is a privileged communication (i.e., allegedly perjured declarations of service) the privilege extends to necessarily related noncommunicative acts (i.e., act of levying).” (*Rusheen, supra*, 37 Cal.4th at pp. 1062-1063.)

Here, the gravamen of appellant’s cross-complaint is that respondents engaged in misconduct to procure a judgment affecting the Malibu real property. The alleged misconduct consisted of (1) communicative acts -- viz., misrepresenting in a case management statement that all parties had been served, filing an opposition arguing that the Trust had been served by substitute service, and arguing in a motion for summary judgment that default had been entered against the Trust -- and (2) assertedly noncommunicative acts -- viz., failing to advise the court that entry of default against Minghella had been rejected, leading the court to believe that Minghella had been served, and not advising the court of its error in stating in a tentative decision that Minghella had been served. Respondents’ alleged communicative acts are privileged, as they are statements made in a judicial proceeding, by a litigant or the litigant’s attorney (Romero), to achieve an object of the litigation (enforcing a judgment), and have some

connection or logical relation to the underlying fraudulent conveyance action. As to the asserted noncommunicative acts, they are also privileged under Civil Code section 47 as necessarily related acts. (*Rusheen, supra*, 37 Cal.4th at pp. 1062-1063; *see also Forro Precision, Inc. v. International Business Machs. Corp.* (9th Cir. 1984) 745 F.2d 1283, 1285 [privilege under Civil Code section 47 applies to “selective failure to disclose information”].)

Citing *Booker, supra*, 155 Cal.App.4th 1366, appellant contends the litigation privilege does not apply to respondents’ wrongful conduct, as respondents’ “strategic delay” in filing the fraudulent conveyance action does not constitute privileged communicative acts. *Booker* is factually and legally distinguishable. There, an attorney (Merhban) who represented two disabled men (Rountree and Gunther) filed substantially identical complaints against restaurant owners (the Bookers) for alleged violations of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.). The Bookers were served only with the Gunther complaint. The day after they settled with Gunther, Merhban served them with Rountree’s complaint. The Bookers filed a cross-complaint for abuse of process against cross-defendants Rountree and Merhban, alleging that they had delayed serving Rountree’s complaint in order to obtain a second settlement for the same violations. (*Booker*, at p. 1369.) After determining that the cross-complaint was subject to section 425.16, the appellate court concluded that the abuse of process claim had merit. (*Booker*, at pp. 1370-1371.) In reaching its conclusion, the court determined that the litigation privilege did not apply, as cross-defendants’ alleged misconduct was not communicative. It observed that the “gravamen of the cross-complaint is failure to serve the underlying action until a prior suit had settled. There is nothing communicative about that -- there is no allegation a statement was made, a representation offered, or any assertive conduct that was a speech

substitute.” (*Id.* at p. 1373.) In contrast, here the trial court properly determined that the gravamen of the instant action is “the attempt to procure a fraudulent conveyance judgment through a misrepresentation to the Court that all necessary parties had been served, and had either appeared or defaulted.” Such alleged misconduct is clearly communicative and thus entitled to the protection of the litigation privilege. Moreover, as the trial court observed, to the extent any other noncommunicative conduct is alleged, it is “necessarily related to the . . . communicative act[s].”

We reject appellant’s contention that he has a viable abuse of process claim based on respondents’ “strategic inactivity” of waiting to file the fraudulent conveyance action. The cross-complaint alleged that respondents waited two years after obtaining their judgment against Dunlap to file the fraudulent conveyance action, purportedly delaying filing until the Malibu real property had appreciated in value. Any such delay, however, had no strategic value, as whether the Malibu property was fraudulently conveyed depends on the value of the property at the time of the transfer, not when the lawsuit was filed. (See *Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80-81 [concluding that plaintiff had suffered no injury from alleged fraudulent transfer of real property where at the time of transfer, property was so encumbered that its value could not support a net recovery for plaintiff]; see also Civ. Code, § 3439.04, subd. (b) [in determining whether transfer of asset was made with intent to defraud, trial court may consider whether “the value of consideration received by the debtor was reasonably equivalent to the value of the asset transferred”].) Similarly, there is no viable abuse of process claim based on trespass; the cross-complaint does not allege that cross-defendants trespassed; it merely states that cross-defendants claimed to have proceeded upon substitute service of the Trust by “purportedly serving documents upon Dunlap,

who lived at the Home at the time.” In short, there is no probability appellant could prevail on his abuse of process claim, and the trial court properly granted respondents’ special motion to strike the cross-complaint.

**DISPOSITION**

The order and judgment are affirmed. Respondents are awarded their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.